(6)

Supreme Court, U.S.
FILED
NOV 25 1996
CLERK

No. 96-423

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RONALD COULTER AND ANISSA COULTER, et al.,

Petitioners,

SHERRY HORTON, et al.,

Plaintiffs-Respondents,

—v—

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO METROPOLITAN'S BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

Daniel W. Cannon
611 Pennsylvania Avenue S.E.
Washington, D.C. 20003
(202)543-7664

Kenneth W. Behrend
(Counsel of Record)
Behrend and Ernsberger
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515
Attorneys for Petitioners

14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATUTES AND RULES iii

REPLY TO METROPOLITAN'S BRIEF
IN OPPOSITION FOR WRIT OF CERTIORARI 1

CONCLUSION 10

TABLE OF AUTHORITIES

Case — Page

BMW v. Gore,
116 S.Ct. 1589 (1996) 2

Georgine v. Amchem Products Inc.,
83 F.3d 610 (3rd Cir. 1996) 8

Phillips Petroleum Co. v. Shutts,
472 U.S. 797, 823, 105 S.Ct. 2965,
2980, 86 L. Ed. 2d, 628 (1985) 8

Seminole Tribe v. Florida,
116 S.Ct. 1114 (1996) 2

United Airlines v. McDonald, 97 S.Ct 2464, 432 6

United States v. South-Eastern Underwriters
Association et.al., 322 U.S. 533 3

STATUTES AND RULES

Case	Page
Federal Rules of Civil Procedure, Rule 23	2,8
McCarran-Ferguson Act, 15 U.S.C.A. 1011-1015, c.20, 59 Stat. 33	1,2,3,8
Supreme Court Rules	9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RONALD COULTER AND ANISSA COULTER, et al.,
Petitioners,

SHERRY HORTON, et al.,
Plaintiffs-Respondents,

--v--

METROPOLITAN LIFE INSURANCE COMPANY,
Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO METROPOLITAN'S BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

The brief in opposition on behalf of the respondent, Metropolitan Life Insurance Company ("Metropolitan") misconstrues not only certain principles enunciated by this Honorable Court in recent decisions, but also the significance of the McCarran-Ferguson Act. Metropolitan uses procedural nuances and selective facts to enhance its argument in an attempt to dance

past state sovereignty, notice and fair hearing, and the McCarran-Ferguson Act. If one accepts Metropolitan's version of history, the courts below only made decisions on procedural matters; they never made decisions on matters involving the application of substantive law. The McCarren-Ferguson Act commands the application of State law to the "business of insurance"; instead, in the instant case, Federal Rule of Civil Procedure 23 was applied. It is difficult to comprehend what substantive law was applied to decide this case.

In BMW v. Gore, 116 S.Ct. 1589 (1996), the majority opinion contains expressions of sound principles regarding attempted extraterritorial application of judicial power, which is the main issue in the instant case.

The Seminole Tribe decision stands for the keystone principle that "each State is a sovereign entity in our federal system", 116 S.Ct. at page 1122. Metropolitan demeans this by saying: "what petitioners call State sovereignty" (Respondents Brief p.20, ftnt. 11).

The same attitude is reflected in the treatment of the

McCarran-Ferguson Act by Metropolitan. It is apt for the petitioners to review the historic background of the McCarran-Ferguson Act, 15 U.S.C.A. 1011-15, c. 20, 59 Stat. 33, March 9, 1945. It was occasioned by the 1944 decision in United States v. South-Eastern Underwriters Association, et.al., 322 U.S. 533, that the business of insurance constitutes interstate commerce subject to regulation by the Congress. In light of the fact that the insurance business had been historically regulated by the States and with the thought that a continuation of that status would provide more effective regulation than national regulation, the Congress passed the McCarran-Ferguson Act in 1945.

With the filing of Coulters' Class Action Complaint in Pennsylvania state court on March 25, 1994, the issue of States' rights to regulate insurance was asserted. When the complaint was filed, no class settlement in Horton had been reached. This action was removed by Metropolitan to federal court (W.D.Pa. No 94-0629). Metropolitan then moved for a stay of the Coulters' case, which was granted because of the Horton case. The stay order made it impossible for the Coulters to move for class certification

and designation of class counsel. The stay order and the representations by Metropolitan, that the two cases overlapped (App. 69a), caused the Coulters to intervene in Florida to protect their State rights.

The case then took a bizarre twist. The Coulters were found to be class members of the Horton class, even though they did not meet the qualifications for class membership.

Metropolitan clearly represented to the district court that the criteria for class membership is set forth in the Proof of Claim Form, in which a proposed member of the class must swear or certify under penalty of perjury as follows:

> . . . 3. **I was misled by this sales solicitation and did not understand that I was buying a life insurance policy at the time I bought it.**

In particular, during the evidentiary hearing on the adequacy of the proposed settlement in Horton, Metropolitan's lead counsel stated on two occasions during the hearing, that Metropolitan excluded those who knew they were purchasing life insurance at the time they purchased their insurance product because they were not part of the class.

The language of this Proof of Claim Form, developed in negotiations of the Horton class and approved by the Horton court, clearly prohibits the Coulters from becoming members of the Horton class action, because the Coulters knew that they were buying life insurance at the time they bought it. Coulters' Second Amended Complaint clearly discloses that the Plaintiffs knew that the product they were purchasing contained life insurance. This is exactly the type of qualification which Metropolitan's lead counsel stated excluded individuals from the Horton class. Nevertheless, the district court found them to be Horton Class members!

Metropolitan goes to great length to point out that the Coulters have acted in some inappropriate manner by not "opting-out" of the Horton action. The question is asked, why should someone "opt-out" of a class action, wherein the Proof of Claim Form sets forth that they are prohibited from participation in the class and its proceeds, since they cannot fulfill the prerequisites for class membership.

Coulters, et.al., have continually asserted that they are not members of the Horton class, as described. Their objective was to

protect themselves and not to destroy the Horton class. Hence, no appeal of the Horton settlement was taken.

Metropolitan also argues that the petitioners should not be allowed to be heard by this Honorable Court, because the nationwide injunction was not issued until after the court of appeals had made its decision. Unfortunately, the petitioners are confronted with, and adversely affected by, a judicial order in this case that purports to deny them the legal right to pursue remedies granted by the statutes of their sovereign State. It would be entirely appropriate, for this Honorable Court to pierce this veil of procedural subterfuge and deal with the legal realities that the Coulters did not have their rights protected.

As to standing, the critical fact is that the district court found the Coulters to be members of the class, which was in one of the four orders appealed by the Coulters to the Eleventh Circuit. (App. 5a, 9a, 32a, 42a,) The Coulters, as members of the class action, become a "party" to the case and fulfill the requirement of 28 U.S.C. Sect.1254(1). A putative class member is a party for appeal purposes. See United Airlines v. McDonald, 97 S.Ct 2464,

432 U.S. 395(1977).

On the point of the Coulters requesting the district court to protect their rights as Pennsylvania citizens, Metropolitan contradicts itself. On page 7, it states "Coulters never asked the District Court to establish a 'subclass' of the Horton class." However, on page 8, it quotes the district court as holding that "The Coulters have no right to speak for the putative subclass they allege."

It must be kept in mind that the petitioners consistently maintained in the courts below that their interests could not be adequately represented unless they were severed from the Horton class or were placed in a separate subclass. Subsequent events have proved they were exactly correct.

Metropolitan's original position opposing the Coulters request to be part of Horton has changed now that Metropolitan has the benefit of an approved class settlement and a nationwide injunction. Metropolitan has moved that the Coulter case in Pennsylvania be transferred to Florida and dismissed because of the settlement and the nationwide injunction.

At page 16, Metropolitan's brief in opposition dismisses the decision in Georgine v. Amchem Products Inc., 83 F.3d 610 (3rd Cir. 1996), as being "completely irrelevant."

The Georgine case holdings on adequacy of representation are extremely relevant. Basic to these holdings is the following statement at 63 F.3d 610, 627:

> (W)e must apply an individualized choice of law analysis to each plaintiff's claim see **Phillips Petroleum Co. v. Shutts**, 472 U.S. 797, 823, 105 S.Ct. 2965, 2980, 86 L. Ed. 2d, 628 (1985), (constitutional limitations on choice of law apply even to nationwide class actions) ... . The states have different rules governing the whole range of issues raised by the plaintiffs' claims ... .

As petitioners have pointed out, the district court thought that it had avoided the constitutional limitations and the McCarren-Ferguson Act by relying on Federal Rule of Civil Procedure 23. (App. 97a-98a)

The Georgine court found a lack of adequacy of representation because of a conflict of interest. In the instant case, the class representatives and class counsel agreed to a settlement which bargained away the rights to statutory, compensatory, and

punitive damages that petitioners are seeking under Pennsylvania law.[1] This is a vivid example of conflict of interest.

The refusal by both the district court and the court of appeals to apply Pennsylvania law to the claims of Pennsylvania citizens, or even to acknowledge the existence of Pennsylvania insurance regulatory law, and choose instead to rely on a Federal Rule of Civil Procedure, certainly constitutes an issue adjudicated by the courts below and certainly constitutes "an important question of federal law that has not been, but should be, settled by this Court", as stated in Supreme Court Rule 10. This issue was raised in both the courts below, and give the Petitioners standing to appeal. It is the Petitioners' substantive rights that have been taken, the named class plaintiffs and the defendant did not have their rights taken and thus have no desire to protect the interests

---

[1]To settle the class action as it was set forth, without modification, the class plaintiffs' counsel were to be paid $2,750,000.00, (two million, seven hundred and fifty thousand dollars) and thus had an strong incentive to not alter, or modify anything as proposed in the class settlement, even though the Coulters raised the issue of protecting their Pennsylvania rights, prior to the district court finally approving the terms of the settlement. In fact, not only did Plaintiffs counsel not do anything to protect the Coulters, they joined in with Metropolitan in opposition to the Coulters.

of the Petitioners.

The issue raised in this Petition for Writ of Certiorari is of great importance to the hundreds of thousands of policyholders who have been defrauded and have claims presently before two panels on Multi-District Litigation which are striving towards nationwide settlements, without consideration of the States' rights issue, as raised in the present case, (the MDLs involve Prudential[2] and Metropolitan), as well as the nationwide class actions filed against other insurance companies in both federal and state courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel W. Cannon
611 Pennsylvania Avenue S.E.
Washington, D.C. 20003
(202)543-7664

Kenneth W. Behrend
(Counsel of Record)
Behrend and Ernsberger
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515
Attorneys for Petitioners

Dated: November 25, 1996

[2] The Prudential Insurance MDL has a proposed nationwide settlement, presently under consideration.